MALAYSIA SMELTING CORPN. BHD.

v.

FOONG WENG YEE & 4 ORS.

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE JC
[CIVIL SUIT NO. 22-75-91]
17 OCTOBER 1994

CONTRACT: Consideration - Validity - Past consideration - Whether a good consideration - Defendants executing guarantee in consideration of plaintiff granting loan to debtor - Guarantee agreement executed after disbursement of loan sum - Whether consideration thereof valid - Whether guarantee enforceable - Contracts Act 1950 ss. 2,26 & 80.

By an agreement executed on 1 April 1985 the plaintiff granted a term advance of RM282,000 to one Haco Sdn. Bhd. (Haco) and clause 3 thereof stipulated that payment of the advance was to be guaranteed by the defendants. The plaintiff disbursed all the advances under the agreement to Haco by 13 April 1985 and four days later, on 17 April 1985, the defendants signed a guarantee agreement with the plaintiff whereby they agreed to be joint and several guarantors to the loan "in consideration of the plaintiff having agreed to advance the said loan to Haco". Haco failed to settle the loan with the result that the plaintiff, intending to recover the sum owed from the guarantors, claimed the same from the first defendant. The Deputy Registrar subsequently granted the plaintiff leave to sign final judgment in respect of the claim and the first defendant henceforth appealed to the High Court against the order. Before the learned Judge the only issue raised by the defendant was that the guarantee herein was unenforceable in law, it being given for a past consideration.

Held:

[1] It is futile to speak of past consideration in our law as if it is a legal concept when in reality it is merely a factual situation which would determine whether an act or forbearance in an agreement exists or not. From the practice aspect of law for the purpose of the present case, there is no necessity to decide whether a consideration is past or not. What is necessary is to decide whether, given the fact that the loan was disbursed by the plaintiff to Haco before the guarantee was signed, the purported consideration given by the plaintiff comes within the act or forbearance described as consideration in s. 2 of the Contracts Act 1950 and if so, whether that consideration falls outside illustration (c) of s. 80 of the Act.

[2] In this case although the "term advance" had been fully disbursed to Haco before the execution of the letter of guarantee, the relationship between the plaintiff and Haco subsisted for so long as the advance remains outstanding. At the time the guarantee was executed it was still outstanding and therefore still forbearing on the plaintiff. It could not be said therefore that the promise by the defendant guarantor in this case was for a past advance with no consideration. The act of forbearance therefore comes squarely within the meaning of s. 2 (d) and falls outside illustration (c) of s. 80 of the Contracts Act 1950. It also satisfies the proviso of s. 26(b) of the Act as in the broader sense it could be said that the guarantee was to compensate the plaintiff "who had already voluntarily done something" (by providing the loan to Haco) to the first defendant.

[3] The principle enunciated in *Hong Kong & Shanghai Banking Corpn. v. Syarikat United Leong Enterprises Sdn. Bhd. & Anor.* [1993] MLJ 449 that a guarantee in respect of a loan that had already been disbursed at the time of the execution of the guarantee and where no further money was advanced or intended to be advanced after the execution of the guarantee, could only be enforced if the loan was given at the desire of the guarantor, does not apply to this case. In that case the guarantee that was given was not an outright guarantee negotiated at the time of the granting of the loan to the debtor. In the event the Court therein was minded to treat the guarantee for a "one-off" transaction as opposed to a guarantee for an ongoing relationship between the plaintiff and the principal debtor. The same factual situation does not arise in the present case which was not a guarantee for a "one-off" but for an on-going relationship.

[Appeal dismissed].

Cases referred to:
Guthrie Waugh Bhd. v. Mataippan Muthucumaru [1972] 1 MLJ 35 ***(refd)***
Pacific & Orient Insurance Co. Sdn. Bhd. v. Grimstern Corporation (M) Sdn. Bhd. & 5 Ors. [1989] 2 CLJ 723 ***(foll)***
Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors. [1991] 3 CLJ 1849 ***(foll)***
Hongkong and Shanghai Banking Corporation v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor. [1993] 2 MLJ 449 ***(dist)***

Legislation referred to:
Contracts Act 1950, ss. 2(d), 26(b), 80
Rules of the High Court 1980, O. 18 r. 13(3)

Other sources referred to:
Chitty on Contracts, 25th Edn., para 162
Contracts and Obligations, Shaik Mohd Noor Alam, 1994 Edn., pp. 173, 174
The Law of Contract in Malaysia and Singapore, Visu Sinnadurai, 1987 Edn., p. 113

For the plaintiff - Siew; M/s. Azman Davidson & Co.
For the defendant - Minderjit Kaur; M/s. Minderjit & Co.

JUDGMENT

Kang Hwee Gee JC:
This is an appeal from the decision of the Deputy Registrar granting the plaintiff leave to sign final judgment in the sum of RM276,810.86 and costs against the first defendant.

The plaintiff, a limited company, had granted a "term advance of RM282,000" to one Haco Sdn. Bhd., the repayment of which would be made against the proceeds of tin ore supplied to the plaintiff from time to time. The whole advance was to be fully paid in full by or before 31 March 1986. The terms and conditions of the said advance was spelt out in the letter form agreement exhibited as P1 in the supporting affidavit of the plaintiff's branch manager. In particular, clause 3 of the agreement stipulates that the repayment of the advance is to be guaranteed jointly and severally by the 1st, 2nd, 3rd and 4th defendants.

The 1st and the other defendants signed another letter form agreement with the plaintiff on 17 April 1985 whereby they agreed to be joint and several guarantors of the said loan (exhibited as P2 in the same affidavit). The consideration for agreeing to provide the guarantee was expressed in the agreement as follows:

> In Consideration of your having at our request agreed to advance to Haco Sdn. Bhd. (hereinafter called "the borrowers" a company incorporated in Malaysia and having its office at No. 11, Persiaran Kampar, Ipoh, Perak a loan of Ringgit Two Hundred and Eighty Two Thousand (RM282,000) only upon the terms specified in your letter to the borrowers of 1 April 1985, we:
>
> (Names of 1st appellant and the 4 other defendants listed)
>
> Hereby Jointly and Severally Guarantee the repayment to you as you shall demand of the said sum of Ringgit Two Hundred and Eighty Two Thousand (RM282,000) only or such lesser principal sum as shall for the time being be owing by the borrowers to you together with interest thereon at the rate being fifteen per centum (15%) per annum or such other rate as shall be imposed by you from time to time subject as hereinafter mentioned, that is to say:

Haco Sdn. Bhd. failed to settle the term loan taken from the plaintiff and on 6 July 1990 the plaintiff obtained judgment against the said company for the total sum of RM276,810.86, being the principal sum of RM213,300 owed plus accrued interest of RM63,510.86 (calculated at 11% p.a. with effect from 1 November 1989).

Intending to recover the sum owed by Haco Sdn. Bhd. from the guarantors the plaintiff sent a letter of demand to the 1st defendant on 3 October 1989 in the form of exhibit P4 in the supporting affidavit but received no response from him.

Except for the averment of past consideration, it is clear that the 1st defendant's defence was not *bona fide*, being only in the form of a general denial devoid of any particulars which are required to be pleaded by O. 18 r. 13(3) of the Rules of the High Court. Before me in the hearing of this appeal, Cik Minder Kaur Counsel for the 1st defendant conceded that the only arguable issue in her client's case was whether the guarantee was given for a past consideration in which event the guarantee would be unenforceable. In order to save the Court's time she intimated that she would only confine her appeal to only this one issue.

According to Cik Minder Kaur the loan agreement between the plaintiff and Haco Sdn. Bhd. (exhibit P1 in the plaintiff's supporting affidavit) was dated 1 April 1985. From the letter of demand (exhibit P4) it was clear, she submitted, that all the advances under the term advance agreement with Haco amounting to RM282,000 were fully disbursed to Haco by 13 April 1985, 4 days before the letter of guarantee was signed on 17 April 1985. She contended therefore that the guarantee was given for a past consideration.

To appreciate Counsel's argument it would be necessary to refer to the relevant provisions of the Contracts Act 1950.

Consideration is described under s. 2(d) as follows:

> when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

Under s. 80,

> Anything arise, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustration (c) of s. 80 read as follows:

> A sells and delivers goods to B. C afterwards, without consideration agrees to pay for them in default of B. The agreement is void.

Under s. 26, an agreement without consideration is void unless:

(b) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor.

While a valid consideration is a requirement in any contract, past consideration itself has never been defined in the Act. However, at common law it is described as an act or forbearance that had been done before and independently of the giving of a promise (see **Chitty on Contracts,** 25th edition para 162). In English law past consideration has never been held to provide good consideration. But here in Malaysia it was held in *Guthrie Waugh Bhd. v. Mataippan Muthucumaru* [1972] 1 MLJ 35 that by virtue of the words "has done or abstained from doing" in s. 2(d) read with s. 26(b) of the Contracts Act 1950, past consideration can be good consideration. Academics have since entered the fray and have made s. 2(d) and s. 26(b) their playground. (Thus Visu Sinnadurai in **"The Law of Contract in Malaysia and Singapore"** 1987 edition at page 113, supports the proposition that past consideration is valid whereas Shaik Mohd. Noor Alam in **"Contracts and Obligations"** 1994 edition at pages 173, 174 argues that in so far as past consideration is understood in English law, the position here is no different.)

In my view it is futile to speak of past consideration in our law as if it is a legal concept when in reality it is merely a factual situation which would determine whether an act or forbearance in an agreement exists or not. From the practice aspect of law for the purpose of the present case however, there is no necessity to decide whether a consideration is past or not. It is only necessary to decide whether, given the fact that the loan was disbursed by the plaintiff to Haco even before the guarantee was signed, the purported consideration given by the plaintiff in this case comes within:

(1) the act or forebearance described as consideration in s. 2 of the Contracts Act 1950 and

(2) whether that consideration falls outside illustration (c) of s. 80 of the Contracts Act 1980.

To decide the issue, I need to rely on only on 2 cases *viz, Pacific & Orient Insurance Co. Sdn. Bhd. v. Grimstern Corporation (M) Sdn. Bhd. & 5 Ors* [1989] 2 CLJ 723 and *Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors.* [1991] 3 CLJ 1849.

In *Pacific & Orient Insurance* the defendant excuted an agreement to guarantee the payment of insurance premiums by an insurance agent more than a month after the principal agency agreement was signed. It was held by Shankar J. that the guarantee was valid because the relationship between the agent and the plaintiff subsisted even after the signing of the agency agreement. What they had contracted for, was for an ongoing relationship which subsisted until 1985 when the action was filed. The agent was still liable to pay the plaintiff all payments due after the signing of the agency agreement.

In *Perwira Habib Bank* Dr. Zakaria M. Yatim J. held that where it was clear from the preamble of the letter of guarantee that the guarantor executed a continuing guarantee to pay the guarantee sum and where the letter of guarantee also states that the "guarantee shall be continuing security binding on ... us ..." there was good consideration although the letter of guarantee was signed after the loan agreement with the principal debtor was executed and the loan sum disbursed some 9 months earlier.

The ratio of the judgments is clear. In each case, the Court found that consideration subsisted between the plaintiff and the guarantor in respect of the loan taken by the principal debtor, as the act or forbearance on the part of the plaintiff continues after the loan was disbursed. The illustration (c) of s. 80, which envisages a promise to pay for goods already delivered to the principal debtor without further consideration would not apply in such cases. Likewise, in the present case it is clear that although the "term advance" had been fully disbursed to Haco Sdn. Bhd. before the execution of the letter of guarantee, the relationship between the plaintiff and Haco subsisted for so long as the advance remain outstanding. At the time the guarantee was executed it was still outstanding and therefore still forbearing on the plaintiff. It could not be said therefore that the promise by the 1st defendant guarantor in this case was for a past advance with no consideration. The act or forbearance therefore comes squarely within the meaning of s. 2(d) and falls outside illustration (c) of s. 80 of the Contracts Act 1950. It also satisfies the proviso of s. 26(b) of the Act as in the broader sense it could be said that the guarantee was to compensate the plaintiff "who had already voluntarily done something" (by providing the loan to Haco) to the 1st defendant.

Accordingly, I find no merit in defence Counsel's submission in this case.

In the course of their arguments both parties cited the case of *Hongkong and Shanghai Banking Corporation v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor.* [1993] 2 MLJ 449, a case which also involves the validity of a letter of guarantee but which in my view is not relevant as the facts are different. In that case, it was held that a guarantee in respect of a loan that had already been disbursed at the time of execution of the guarantee and where no further money was advanced or intended to be advanced after the execution of the guarantee, could only be enforced against the guarantor if the loan was given 'at the desire' of the guarantor. The guarantee in question it would appear from the facts, was not an outright guarantee negotiated at the time of the granting of the loan to the principal debtor. The guarantee was given only after the principal debtor was unable to pay the loan and after due negotiations between them to defer the payments of the sums due. In the event, the Court (Ian H.C. Chin JC) was minded to treat the guarantee as a guarantee for a "one-off" transaction as opposed to a guarantee for an ongoing relationship between the plaintiff and the principal debtor. The same factual situation does not arise in the present case which was not a guarantee for a 'one-off' but for an on-going relationship.

For the reasons stated, I would dismiss the appellant's appeal with costs.